IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In Re Application of:	)	
	)	Confirmation No: **7840**
Raj Dosanjh	)	
	)	Group Art Unit: **3628**
Serial No.: **10/630,432**	)	
	)	Examiner: **Vetter, Daniel**
Filed: **July 29, 2003**	)	
	)	
For: **A Method for Determining Commodity**	)	Atty. Docket No.: **300110548-2**
Pricing Within an Industry	)	

APPEAL BRIEF UNDER 37 C.F.R. § 41.37

Mail Stop: Appeal Brief-Patents
Commissioner for Patents
P.O. Box 1450
Alexandria, Virginia 22313-1450

Sir:

This Appeal Brief under 37 C.F.R. § 41.37 is submitted in support of the Notice of

Appeal filed June 4, 2008, responding to the final Office Action mailed March 4, 2008.

It is not believed that extensions of time or fees are required to consider this

Appeal Brief. However, in the event that additional extensions of time are necessary to

allow consideration of this paper, such extensions are hereby petitioned under 37

C.F.R. §1.136(a), and any fees required therefor are hereby authorized to be charged to

Deposit Account No. 08-2025.

I. Real Party in Interest

The real party in interest is Hewlett-Packard Development Company, LP, a limited partnership established under the laws of the State of Texas and having a principal place of business at 20555 S.H. 249 Houston, TX 77070, U.S.A. (hereinafter "HPDC"). HPDC is a Texas limited partnership and is a wholly-owned affiliate of Hewlett-Packard Company, a Delaware Corporation, headquartered in Palo Alto, CA. The general or managing partner of HPDC is HPQ Holdings, LLC.

II. Related Appeals and Interferences

There are no known related appeals or interferences that will affect or be affected by a decision in this Appeal.

III. Status of Claims

Claims 1-2, 4-13, 15-21, and 23-24 stand finally rejected. Claims 3, 14, and 22 have been canceled. The final rejections of claims 1-2, 4-13, 15-21, and 23-24 are appealed.

IV. Status of Amendments

No claim amendments have been made subsequent to the final Office Action mailed March 4, 2008. The claims in the attached Claims Appendix (see below) reflect the present state of Applicant's claims.

V. Summary of Claimed Subject Matter

The claimed inventions are summarized below with reference numerals and references to the written description ("specification") and drawings. The subject matter described in the following appears in the original disclosure at least where indicated, and may further appear in other places within the original disclosure.

Embodiments according to independent claim 1 describe a method of determining a price at which a supplier provides a commodity to a customer. The method is performed by the supplier and comprises characterizing, by the supplier, nature of growth of the customer's usage of the commodity, Applicant's specification, page 5, lines 6-8; receiving information from the customer specifying the commodity required, Applicant's specification, page 5, lines 8-9; and receiving notification of the use of a quantity of the commodity by the customer. Applicant's specification, page 5, line 9. Such a method further comprises determining, by the supplier, a price for the commodity used, where the determined price is dependent on the quantity of the commodity used by the customer, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price, Applicant's specification, page 5, lines 10-13, wherein, if usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer. Applicant's specification, page 9, lines 21-23.

Embodiments according to independent claim 12 describe a computer-readable storage medium for storing a computer program operable, when executed by a

computer (Figure 1b, 10), to determine a price at which a supplier provides a commodity to a customer. Applicant's specification, page 8, lines 15-21. The computer program is operable to receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity, Applicant's specification, pages 8-9, lines 25-1; receive, by the supplier, input specifying the commodity required by the customer, Applicant's specification, page 9, lines 1-2; and receive, by the supplier, input comprising notification of the use of a quantity of the commodity by the customer. Applicant's specification, page 9, lines 2-3. The computer program is further operable to determine, by the supplier, a price for the commodity used, where the determined price is dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time, Applicant's specification, page 9, lines 3-6, wherein, if usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer. Applicant's specification, page 9, lines 21-23.

Embodiments according to independent claim 23 describe a price determination device comprising a processor operable to implement a method of determining a price at which a supplier provides a commodity to a customer. Applicant's specification, page 9, lines 8-10. The method comprises characterizing, by the supplier, nature of growth of the customer's usage of the commodity, Applicant's specification, page 9, lines 10-11; receiving information from the customer specifying the commodity required, Applicant's specification, page 9, lines 11-12; and receiving notification of the use of a

quantity of the commodity by the customer. Such a method further comprises determining, by the supplier, a price for the commodity used, where the determined price is dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price. Applicant's specification, page 9, lines 13-17.

Embodiments according to independent claim 24 describe a price determination device comprising a processor executing a program to determine a price at which a supplier provides a commodity to a customer. Applicant's specification, page 9, lines 19-21. The program is operable to cause the processor to receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity, Applicant's specification, page 9, lines 22-23; receive, by the supplier, input specifying the commodity required by the customer, Applicant's specification, page 9, line 23; and receive, by the supplier, input comprising notification of the use of a quantity of the commodity by the customer. Applicant's specification, page 9, lines 23-24. The program is further operable to determine, by the supplier, a price for the commodity used, where the determined price is dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time. Applicant's specification, pages 9-10, lines 25-3.

VI. Grounds of Rejection to be Reviewed on Appeal

The following grounds of rejections are to be reviewed on appeal:

Claims 1-2, 4-7, 11-13, 15-18, and 23-24 have been rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over *Takriti* (U.S. Patent No. 6,021,402) in view of *Pitchford* (U.S. Patent No. 6,327,541) in further view of *Rose* (U.S. Patent No. 5,963,920).

Claims 8-10 and 19-21 have been rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over *Takriti* in view of *Pitchford* in further view of *Rose* in further view of Official Notice.

VII. Arguments

1. Response to Rejection of Claims 1-2, 4-7, 11-13, 15-18, and 23-24 under 35 U.S.C. §103

Claims 1-2, 4-7, 11-13, 15-18, and 23-24 have been rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over *Takriti* (U.S. Patent No. 6,021,402) in view of *Pitchford* (U.S. Patent No. 6,327,541) in further view of *Rose* (U.S. Patent No. 5,963,920). Applicant respectfully traverses the rejection.

a. Applicant's Claims 1-2, 4-7, and 11

As presented in independent claim 1, Applicant claims:

> A method of determining a price at which a supplier provides a commodity to a customer, the method being performed by the supplier and comprising:
> *(a) characterizing, by the supplier, nature of growth of the customer's usage of the commodity;*

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(b) receiving information from the customer specifying the commodity required;

(c) receiving notification of the use of a quantity of the commodity by the customer; and

(d) determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used by the customer, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price, wherein, if usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer.

(Emphasis added).

Applicant respectfully submits that independent claim 1 is allowable for at least the reason that *Takriti* in view of *Pitchford* in further view of *Rose* does not disclose, teach, or suggest at least "characterizing, by the supplier, nature of growth of the customer's usage of the commodity" and "determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used by the customer, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price, wherein, if usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer," as recited in claim 1.

For example, *Takriti* describes that a schedule of operation for an electrical power generating unit or plant is determined by considering forecasts of how much load is to be placed on the plant by customers; physical and operational properties of power generating units; predictions of trading prices for electrical power; fuel prices and its

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availability that is used by power generating units to produce electrical power. *See* col. 7, lines 19-35. Based on this information, an operating schedule is produced for a power generating unit telling a unit manager how much and what type of fuel to use and how much to burn each hour of the week. "What distinguishes our tool is that it allows the user to incorporate risk, through predictions of the load and fuel prices, and uses these predictions to create optimal schedules." *See* col. 8, lines 43-65.

Therefore, *Takriti* describes a system or process provided by a supplier that computes an operational schedule for the supplier based on an analysis of fuel consumed by the supplier's plant, prices at which power may be sold from the supplier's plant, and load requirements placed on the supplier's plant. In this analysis, it is noted that a characterization of a customer's usage of power supplied by the supplier is not made; a determination of a price for a quantity of power requested by a customer is not made; and a level of commercial risk is not determined for a customer which is a basis for determining the price for a quantity of power specified by the customer.

Accordingly, *Takriti* fails to teach or suggest at least "characterizing, by the supplier, nature of growth of the customer's usage of the commodity" and "determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used by the customer, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price, wherein, if usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer," as recited in claim 1.

With regard to *Pitchford*, it describes an electronic energy management system that allows a customer or user to view his or her energy usage over a communication network. Accordingly, *Pitchford* individually or in combination with *Takriti* fails to teach or suggest at least "characterizing, by the supplier, nature of growth of the customer's usage of the commodity" and "determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used by the customer, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price, wherein, if usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer," as recited in claim 1. Therefore, *Pitchford* does not remedy the deficiencies of *Takriti.*

With regard to *Rose*, it discloses a method of inventory control using electronic sensors so that a supplier is provided up to the minute stock levels of the supplier's inventory. For example, *Rose* describes that the status of a storage rack for a supplier is monitored and provided to the supplier which enables the supplier to determine the status of its inventory and whether the supplier should reorder supplies to restock its inventory. *See* col. 2, lines 39-52, col. 5, lines 30-49, and col. 7, lines 1-18. As such, *Rose* does not disclose that a customer's usage of commodities are used by a supplier to determine the pricing of a commodity provided by the supplier to the customer of the supplier. Rather, *Rose* describes that a supplier monitors its own inventory levels so that it may maintain inventory levels above a desired level. Accordingly, *Rose* individually or in combination with *Pitchford* and *Takriti* fails to teach or suggest at least

"characterizing, by the supplier, nature of growth of the customer's usage of the commodity" and "determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used by the customer, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price, wherein, if usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer," as recited in claim 1. Therefore, *Rose* does not remedy the deficiencies of *Pitchford and Takriti.*

The final Office Action contends that an electrical utility may be both a supplier and a customer, and the "the system in Takriti incorporates commercial risk associated with the nature of growth of its own usage of the necessary commodity inputs (fuel, electricity available on the spot market) that it requires to deliver power to end users. What the system therefore lacks is that the suppliers of these commodity inputs make the recited determinations." Page 2. In response, Applicants submit that if one was to deem an electrical utility to be a customer, as suggested by the Examiner, then *Takriti* should disclose that a supplier of fuel, as an example, to the electrical utility performs "characterizing, by the supplier, nature of growth of the customer's usage of the commodity," as recited in claim 1. However, *Takriti* (and the other cited references) do not disclose this and other claimed features.

Further, the final Office Action states that "Rose teaches that '[t]he supplier can thus monitor the instantaneous inventory status of a remotely located customer.'" Page

2.   In response, Applicants submit that the monitoring of a inventory status of items on a shelf at a customer location does not disclose "determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used by the customer, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price, wherein, if usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer," as recited in claim 1. *See, e.g.,* cols. 5-6, lines 65-21.

For at least these reasons, claim 1 is not obvious under the proposed combination of *Takriti* in view of *Pitchford* in further view of *Rose*, and the rejection should be overturned.

Dependent claims 2, 4-7, and 11 (which depend from independent claim 1) are allowable as a matter of law for at least the reason that the dependent claims 2, 4-7, and 11 contain all the features of allowable independent claim 1. *See, e.g., In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988). Accordingly, the rejection to these claims should be overturned.

b.   Applicant's Claims 12-13 and 15-21

As presented in independent claim 12, Applicant claims:

> A computer-readable storage medium for storing a computer program operable, when executed by a computer, to determine a price at which a supplier provides a commodity to a customer, the computer program being operable to:
> *(a) receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity;*

(b) receive, by the supplier, input specifying the commodity required by the customer;

(c) receive, by the supplier, input comprising notification of the use of a quantity of the commodity by the customer; and

(d) determine, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time, wherein, if usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer.

(Emphasis added).

Applicant respectfully submits that independent claim 12 is allowable for at least the reason that *Takriti* in view of *Pitchford* in view of *Rose* does not disclose, teach, or suggest at least to "receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity" and "determine, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time, wherein, if usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer," as emphasized above.

For example, *Takriti* describes that a schedule of operation for an electrical power generating unit or plant is determined by considering forecasts of how much load is to be placed on the plant by customers; physical and operational properties of power generating units; predictions of trading prices for electrical power; fuel prices and its availability that is used by power generating units to produce electrical power. *See* col. 7, lines 19-35. Based on this information, an operating schedule is produced for a

power generating unit telling a unit manager how much and what type of fuel to use and how much to burn each hour of the week. "What distinguishes our tool is that it allows the user to incorporate risk, through predictions of the load and fuel prices, and uses these predictions to create optimal schedules." *See* col. 8, lines 43-65.

In other words, *Takriti* describes a system or process provided by a supplier that computes an operational schedule for the supplier based on an analysis of fuel consumed by the supplier's plant, prices at which power may be sold from the supplier's plant, and load requirements placed on the supplier's plant. In this analysis, it is noted that a characterization of a customer's usage of power supplied by the supplier is not made; a determination of a price for a quantity of power requested by a customer is not made; and a level of commercial risk is not determined for a customer which is a basis for determining the price for a quantity of power specified by the customer.

Accordingly, *Takriti* fails to teach or suggest at least to "receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity" and "determine, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time, wherein, if usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer," as recited in claim 12.

With regard to *Pitchford*, it describes an electronic energy management system that allows a customer or user to view his or her energy usage over a communication

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network. Accordingly, *Pitchford* individually or in combination with *Takriti* fails to teach or suggest at least to "receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity" and "determine, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time, wherein, if usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer," as recited in claim 12. Therefore, *Pitchford* does not remedy the deficiencies of *Takriti*.

With regard to *Rose*, it discloses a method of inventory control using electronic sensors so that a supplier is provided up to the minute stock levels of the supplier's inventory. For example, *Rose* describes that the status of a storage rack for a supplier is monitored and provided to the supplier which enables the supplier to determine the status of its inventory and whether the supplier should reorder supplies to restock its inventory. *See* col. 2, lines 39-52, col. 5, lines 30-49, and col. 7, lines 1-18. As such, *Rose* does not disclose that a customer's usage of commodities are used by a supplier to determine the pricing of a commodity provided by the supplier to the customer of the supplier. Rather, *Rose* describes that a supplier monitors its own inventory levels so that it may maintain inventory levels above a desired level. Accordingly, *Rose* individually or in combination with *Pitchford* and *Takriti* fails to teach or suggest at least "receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity" and "determine, by the supplier, a price for the commodity used, the

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determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time, wherein, if usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer," as recited in claim 12. Therefore, *Rose* does not remedy the deficiencies of *Pitchford and Takriti.*

For at least these reasons, claim 12 is not obvious under the proposed combination of *Takriti* in view of *Pitchford* in further view of *Rose*, and the rejection should be overturned.

Dependent claims 13 and 15-21 (which depend from independent claim 12) are allowable as a matter of law for at least the reason that the dependent claims 13 and 15-21 contain all the features of allowable independent claim 12. *See, e.g., In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988). Accordingly, the rejection to these claims should be overturned.

c.   Applicant's Claim 23

As presented in independent claim 23, Applicant claims:

> A price determination device comprising a processor operable to implement a method of determining a price at which a supplier provides a commodity to a customer, the method comprising:
> **(a) characterizing, by the supplier, nature of growth of the customer's usage of the commodity;**
> (b) receiving information from the customer specifying the commodity required;
> (c) receiving notification of the use of a quantity of the commodity by the customer; and

> *(d) determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price.*

(Emphasis added).

Applicant respectfully submits that independent claim 23 is allowable for at least the reason that *Takriti* in view of *Pitchford* in view of *Rose* does not disclose, teach, or suggest at least "characterizing, by the supplier, nature of growth of the customer's usage of the commodity" and "determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price," as recited in claim 23.

For example, *Takriti* describes that a schedule of operation for an electrical power generating unit or plant is determined by considering forecasts of how much load is to be placed on the plant by customers; physical and operational properties of power generating units; predictions of trading prices for electrical power; fuel prices and its availability that is used by power generating units to produce electrical power. *See* col. 7, lines 19-35. Based on this information, an operating schedule is produced for a power generating unit telling a unit manager how much and what type of fuel to use and how much to burn each hour of the week. "What distinguishes our tool is that it allows the user to incorporate risk, through predictions of the load and fuel prices, and uses these predictions to create optimal schedules." *See* col. 8, lines 43-65.

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In other words, *Takriti* describes a system or process provided by a supplier that computes an operational schedule for the supplier based on an analysis of fuel consumed by the supplier's plant, prices at which power may be sold from the supplier's plant, and load requirements placed on the supplier's plant. In this analysis, it is noted that a characterization of a customer's usage of power supplied by the supplier is not made; a determination of a price for a quantity of power requested by a customer is not made; and a level of commercial risk is not determined for a customer which is a basis for determining the price for a quantity of power specified by the customer.

Accordingly, *Takriti* fails to teach or suggest at least "characterizing, by the supplier, nature of growth of the customer's usage of the commodity" and "determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price," as recited in claim 23.

With regard to *Pitchford*, it describes an electronic energy management system that allows a customer or user to view his or her energy usage over a communication network. Accordingly, *Pitchford* individually or in combination with *Takriti* fails to teach or suggest at least "characterizing, by the supplier, nature of growth of the customer's usage of the commodity" and "determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of

determination of the price," as recited in claim 23. Therefore, *Pitchford* does not remedy the deficiencies of *Takriti*.

With regard to *Rose*, it discloses a method of inventory control using electronic sensors so that a supplier is provided up to the minute stock levels of the supplier's inventory. For example, *Rose* describes that the status of a storage rack for a supplier is monitored and provided to the supplier which enables the supplier to determine the status of its inventory and whether the supplier should reorder supplies to restock its inventory. *See* col. 2, lines 39-52, col. 5, lines 30-49, and col. 7, lines 1-18. As such, *Rose* does not disclose that a customer's usage of commodities are used by a supplier to determine the pricing of a commodity provided by the supplier to the customer of the supplier. Rather, *Rose* describes that a supplier monitors its own inventory levels so that it may maintain inventory levels above a desired level. Accordingly, *Rose* individually or in combination with *Pitchford* and *Takriti* fails to teach or suggest at least "characterizing, by the supplier, nature of growth of the customer's usage of the commodity" and "determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price," as recited in claim 23. Therefore, *Rose* does not remedy the deficiencies of *Pitchford and Takriti*.

For at least these reasons, claim 23 is not obvious under the proposed combination of *Takriti* in view of *Pitchford* in view of *Rose*, and the rejection should be overturned.

d.   <u>Applicant's Claim 24</u>

As presented in independent claim 24, Applicant claims:

> A price determination device comprising a processor executing a program to determine a price at which a supplier provides a commodity to a customer, the program being operable to cause the processor to:
>
> ***(a) receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity;***
>
> (b) receive, by the supplier, input specifying the commodity required by the customer;
>
> (c) receive, by the supplier, input comprising notification of the use of a quantity of the commodity by the customer; and
>
> ***(d) determine, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time.***

(Emphasis added).

Applicant respectfully submits that independent claim 24 is allowable for

at least the reason that *Takriti* in view of *Pitchford* in view of *Rose* does not disclose,

teach, or suggest at least to "receive, by the supplier, input characterising nature of

growth of the customer's usage of the commodity" and "determine a price for the

commodity used, the determined price being dependent on the quantity of the

commodity used, a level of commercial risk associated with the nature of growth of the

customer's usage of the commodity, and an industry average price for the commodity at

the time," as recited in claim 24.

For example, *Takriti* describes that a schedule of operation for an electrical power

generating unit or plant is determined by considering forecasts of how much load is to

be placed on the plant by customers; physical and operational properties of power

generating units; predictions of trading prices for electrical power; fuel prices and its

availability that is used by power generating units to produce electrical power. *See* col. 7, lines 19-35. Based on this information, an operating schedule is produced for a power generating unit telling a unit manager how much and what type of fuel to use and how much to burn each hour of the week. "What distinguishes our tool is that it allows the user to incorporate risk, through predictions of the load and fuel prices, and uses these predictions to create optimal schedules." *See* col. 8, lines 43-65.

Therefore, *Takriti* describes a system or process provided by a supplier that computes an operational schedule for the supplier based on an analysis of fuel consumed by the supplier's plant, prices at which power may be sold from the supplier's plant, and load requirements placed on the supplier's plant. In this analysis, it is noted that a characterization of a customer's usage of power supplied by the supplier is not made; a determination of a price for a quantity of power requested by a customer is not made; and a level of commercial risk is not determined for a customer which is a basis for determining the price for a quantity of power specified by the customer.

Accordingly, *Takriti* fails to teach or suggest at least to "receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity" and "determine a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time," as recited in claim 24.

With regard to *Pitchford*, it describes an electronic energy management system that allows a customer or user to view his or her energy usage over a communication network. Accordingly, *Pitchford* individually or in combination with *Takriti* fails to teach or

suggest at least to "receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity" and "determine a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time," as recited in claim 24. Therefore, *Pitchford* does not remedy the deficiencies of *Takriti*.

With regard to *Rose*, it discloses a method of inventory control using electronic sensors so that a supplier is provided up to the minute stock levels of the supplier's inventory. For example, *Rose* describes that the status of a storage rack for a supplier is monitored and provided to the supplier which enables the supplier to determine the status of its inventory and whether the supplier should reorder supplies to restock its inventory. *See* col. 2, lines 39-52, col. 5, lines 30-49, and col. 7, lines 1-18. As such, *Rose* does not disclose that a customer's usage of commodities are used by a supplier to determine the pricing of a commodity provided by the supplier to the customer of the supplier. Rather, *Rose* describes that a supplier monitors its own inventory levels so that it may maintain inventory levels above a desired level. Accordingly, *Rose* individually or in combination with *Pitchford* and *Takriti* fails to teach or suggest at least "receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity" and "determine a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time," as recited in claim 24. Therefore, *Rose* does not remedy the deficiencies of *Pitchford and Takriti*.

For at least these reasons, claim 24 is not obvious under the proposed combination of *Takriti* in view of *Pitchford*, and the rejection should be overturned.

2.   Response to Rejection of Claims 1-2, 4-7, 11-13, 15-18, and 23-24 under 35 U.S.C. §103

Claims 8-10 and 19-21 have been rejected under 35 U.S.C. §103(a) as allegedly being unpatentable over *Takriti* in view of *Pitchford* in further view of *Rose* in further view of Official Notice. Applicant respectfully traverses the rejection.

a.   Applicant's Claims 8-10

Because independent claim 1 is allowable over the cited art of record, dependent claims 8-10 (which depend from independent claim 1) are allowable as a matter of law for at least the reason that the dependent claims 8-10 contain all the features of independent claim 1. *See, e.g., In re Fine*, 837 F.2d 1071 (Fed. Cir. 1988). Accordingly, the rejection to these claims should be withdrawn.

With respect to claim 8, the final Office Action states that "it is old and well established that the information technology industry uses various commodities, such as power and processor availability." Page 11. Per claims 9 and 10, the final Office Action states that "it is old and well established that the information technology industry uses the commodities of storage capacity, server processing capability, and support service." Pages 11-12.

Applicant respectfully traverses each of the findings of Official Notice. In particular, a specific or particular reason why the finding of Official Notice is improper is

that the claims 8-10 describe methods, having various features, for determining a price for a commodity for a customer based upon input received from the customer, and it has not been established that these features are capable of instant and unquestionable demonstration as being well-known within the context of the claimed subject matter. As one example, among others, it has not been established that "determining the price of commoditized solution elements in the information technology industry," as recited in claim 8, is well known within the context of the described method of claim 8 (which includes all the features of the base claims of claim 8).

Per MPEP 2144.03(A), "It would not be appropriate for the examiner to take official notice of facts without citing a prior art reference where the facts asserted to be well known are not capable of instant and unquestionable demonstration as being well-known." Also, per MPEP 2144.03(B), "If such notice is taken, the basis for such reasoning must be set forth explicitly. The Examiner must provide specific factual findings predicated on sound technical and scientific reasoning to support his or her conclusion of common knowledge."

As specific factual findings predicated on sound technical and scientific reasoning in support of the conclusion of common knowledge are not provided in the Office Action, the Official Notice and the rejections based upon this finding should be withdrawn. Further, under 37 CFR § 1.104(d)(2), if the rejections are based on facts within the personal knowledge of the examiner, "the data should be stated as specifically as possible, and the facts must be supported, when called for by the applicant, by an affidavit from the examiner. Such an affidavit is subject to contradiction or explanation by the affidavits of the applicant and other persons." Therefore, if this

rejection is maintained, Applicant respectfully requests that document(s) be provided as support.

b. Applicant's Claims 19-21

Because independent claim 12 is allowable over the cited art of record, dependent claims 19-21 (which depend from independent claim 12) are allowable as a matter of law for at least the reason that the dependent claims 19-21 contain all the features of independent claim 12. See, e.g., In re Fine, 837 F.2d 1071 (Fed. Cir. 1988). Accordingly, the rejection to these claims should be withdrawn.

With respect to claim 19, the Office Action further states that "it is old and well established that the information technology industry uses various commodities, such as power and processor availability." Page 12. Per claim 20, the Office Action states that "it is old and well established that the information technology industry uses the commodities of storage capacity, server processing capability, and support service." Pages 12-13. Per claim 21, the Office Action states that "it is old and well established that the information technology industry uses the commodities of storage capacity, server processing capability, and support service." Page 13.
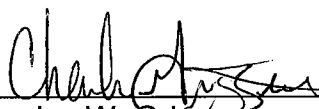
Applicant respectfully traverses each of the findings of Official Notice. In particular, a specific or particular reason why the finding of Official Notice is improper is that the claims 19-21 describe a determination of a price for a commodity for a customer based upon input received from the customer, and it has not been established that the features that are recited in claims 19-21 are capable of instant and

unquestionable demonstration as being well-known within the context of the claimed

subject matter of the base claims, as previously mentioned.

VIII. Conclusion

In summary, it is Applicant's position that Applicant's claims are patentable over the applied cited art references and that the rejection of these claims should be overturned. Appellant therefore respectfully requests that the Board of Appeals overturn the Examiner's rejection and allow Applicant's pending claims.

Respectfully submitted,

By: _____

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Claims Appendix under 37 C.F.R. § 41.37(c)(1)(viii)

The following are the claims that are involved in this Appeal.

1.   A method of determining a price at which a supplier provides a commodity to a customer, the method being performed by the supplier and comprising:

(a) characterizing, by the supplier, nature of growth of the customer's usage of the commodity;

(b) receiving information from the customer specifying the commodity required;

(c) receiving notification of the use of a quantity of the commodity by the customer; and

(d) determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used by the customer, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price, wherein, if usage monitoring indicates that the customer has a need for more or less of the commodity, the method further comprises effecting provision of more or less of the commodity from the supplier to the customer.

2.   A method as claimed in claim 1, wherein the step of receiving notification of the use of a quantity of the commodity further comprises monitoring the customer's usage of the commodity.

3.   Canceled

4. A method as claimed in claim 2, wherein the customer's usage history of the commodity, as monitored by the supplier, is used to dynamically reassess the nature of growth of the customer's usage of the commodity and the associated level of commercial risk.

5. A method as claimed in claim 1 wherein, in the step of characterising the nature of growth of the customer's usage of the commodity, the nature of growth of the customer's usage of the commodity is characterised as either constant growth, explosive growth or volatile growth, and wherein, in the step of determining a price for the commodity used, the corresponding level of commercial risk is determined respectively as low, high or intermediate.

6. A method as claimed in claim 1 wherein, in the step of receiving information from the customer specifying the commodity required, the commodity is selected from a plurality of alternatives in a same category of commodity.

7.   A method as claimed in claim 6, wherein the same category of commodity is one of a plurality of categories and a selection is made from more than one category, and wherein the alternatives available for selection in each category are modified in response to customer's preference data, or on the basis of previously-selected commodities.

8.   A method as claimed in claim 1 for determining the price of commoditized solution elements in the information technology industry.

9.   A method as claimed in claim 8, wherein the categories of commodities include storage capacity, server processing capability, and level of support service required.

10.   A method as claimed in claim 9 wherein, for the commodities of storage capacity or server processing capability, the step of receiving notification of the use of a quantity of the commodity is performed using monitoring and reporting software or hardware installed on a server of the customer.

11.   A method as claimed in claim 1 executed using a computer program.

12. A computer-readable storage medium for storing a computer program operable, when executed by a computer, to determine a price at which a supplier provides a commodity to a customer, the computer program being operable to:

(a) receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity;

(b) receive, by the supplier, input specifying the commodity required by the customer;

(c) receive, by the supplier, input comprising notification of the use of a quantity of the commodity by the customer; and

(d) determine, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time, wherein, if usage data indicates that the customer has a need for more or less of the commodity, the program is operable to effect provision of more or less of the commodity from the supplier to the customer.

13. A computer-readable medium as claimed in claim 12, the computer program further operable to receive data from a remote device specifying the usage of the commodity by the customer.

14. Canceled

15. A computer-readable medium as claimed in claim 13, the computer program further operable to interpret the customer's usage history of the commodity to dynamically reassess the nature of growth of the customer's usage of the commodity and the associated level of commercial risk.

16. A computer-readable medium as claimed in claim 12, wherein the nature of growth of the customer's usage of the commodity is characterised as either constant growth, explosive growth or volatile growth, and wherein the corresponding level of commercial risk is determined respectively as low, high or intermediate.

17. A computer-readable medium as claimed in claim 12 wherein, when receiving input specifying the commodity required by the customer, the commodity is selected from a plurality of alternatives in a same category of commodity.

18. A computer-readable medium as claimed in claim 17, wherein the same category of commodity is one of a plurality of categories and a user makes a selection from more than one category, and wherein the computer program modifies the alternatives available for selection in each category following input of customer preference data, or on the basis of previously-selected commodities.

19. A computer-readable medium as claimed in claim 12, the computer program operable to determine the price of commoditized solution elements in the information technology industry.

20.   A computer-readable medium as claimed in claim 19, wherein the categories of commodities include server storage capacity, server processing capability, and level of support service required.

21.   A computer-readable medium as claimed in claim 19, wherein the data specifying the usage of the commodity by the customer is supplied from monitoring software or hardware installed on a server of the customer.

22.   Canceled

23.   A price determination device comprising a processor operable to implement a method of determining a price at which a supplier provides a commodity to a customer, the method comprising:

(a) characterizing, by the supplier, nature of growth of the customer's usage of the commodity;

(b) receiving information from the customer specifying the commodity required;

(c) receiving notification of the use of a quantity of the commodity by the customer; and

(d) determining, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time of determination of the price.

24.   A price determination device comprising a processor executing a program to determine a price at which a supplier provides a commodity to a customer, the program being operable to cause the processor to:

(a) receive, by the supplier, input characterising nature of growth of the customer's usage of the commodity;

(b) receive, by the supplier, input specifying the commodity required by the customer;

(c) receive, by the supplier, input comprising notification of the use of a quantity of the commodity by the customer; and

(d) determine, by the supplier, a price for the commodity used, the determined price being dependent on the quantity of the commodity used, a level of commercial risk associated with the nature of growth of the customer's usage of the commodity, and an industry average price for the commodity at the time.

Evidence Appendix under 37 C.F.R. § 41.37(c)(1)(ix)

There is no extrinsic evidence to be considered in this Appeal. Therefore, no evidence is presented in this Appendix.

<u>Related Proceedings Appendix under 37 C.F.R. § 41.37(c)(1)(x)</u>

There are no related proceedings to be considered in this Appeal. Therefore, no such proceedings are identified in this Appendix.